

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA, : CR 05-104

:

-against- :

SIRAJ SHAHAWAR MATIN, : United States Courthouse
Brooklyn, New York

:

Defendant. : November 9, 2005
5:45 o'clock p.m.

----- X

TRANSCRIPT OF CONFERENCE
BEFORE THE HONORABLE NINA GERSHON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

ROSLYNN R. MAUSKOPF
United States Attorney
BY: TODD HARRISON
Assistant United States Attorney
One Pierrepont Plaza
Brooklyn, New York

For the Defendant:

MARTIN R. STOLAR, ESQ.

Court Reporter

Gene Rudolph
225 Cadman Plaza East
Brooklyn, New York
(718) 260-2538

Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

1 THE CLERK: Criminal cause for status conference,
2 United States versus Martin.

3 The appearances, please.

4 MR. HARRISON: Todd Harrison for the United States.
5 Good afternoon, Your Honor.

6 MR. STOLAR: Martin R. Stolar.

7 Good evening, Judge.

8 THE COURT: Hello, counsel.
9 I'm sorry I had to keep you waiting.

10 MR. HARRISON: That's okay.

11 THE COURT: I was just finishing up another trial.
12 Okay.

13 MR. STOLAR: Let me suggest the first order of
14 business.

15 THE COURT: Yes.

16 MR. STOLAR: That is, I am pleased to say that I
17 will withdraw the conditions of confinement motion. My client
18 has been released from the Special Housing Unit and he is now
19 in general population.

20 THE COURT: I see.

21 The next thing?

22 MR. STOLAR: Second order of business, I guess we
23 will have a hearing on the motion to suppress based on the
24 government's letter of -- dated yesterday.

25 THE COURT: All right. I thought I was going to get

1 papers today. Is that the paper?

2 MR. STOLAR: That --

3 MR. HARRISON: The only issue left open, Judge, was
4 we had objected to them submitting an attorney affirmation.

5 THE COURT: Right.

6 That was taken care of?

7 MR. HARRISON: That was taken care of. They
8 submitted the defendant's own affirmation.

9 THE COURT: Right.

10 MR. HARRISON: Therefore, we are not objecting to
11 their --

12 THE COURT: What about any legal briefing? I
13 thought I would get something before.

14 Your assumption is that you will not do that until
15 after the hearing?

16 MR. STOLAR: Posthearing.

17 MR. HARRISON: Yes.

18 THE COURT: Do you think so? I am not going to know
19 what I am looking for at the hearing?

20 MR. HARRISON: It's pretty simple. We are talking
21 about the voluntariness of his post-arrest statements.

22 MR. STOLAR: That's correct.

23 THE COURT: That's the only issue? Voluntariness?

24 MR. STOLAR: Voluntariness in the overall sense.
25 That includes Miranda and whether the waiver of Miranda was a

1 voluntary and knowing waiver.

2 THE COURT: Okay. How long do you anticipate the
3 hearing will take?

4 MR. HARRISON: Not long, Judge. I am in the process
5 of evaluating it now. I think the government will just have
6 two, three, at the most, witnesses. I don't anticipate them
7 taking more than a couple of hours.

8 MR. STOLAR: The defendant may testify at the
9 hearing. Then we may have one other witness. I would -- I
10 think it will probably be at least one day.

11 THE COURT: Do you think it will be a full day?

12 MR. STOLAR: I think so.

13 THE COURT: All right. Let me take a look at the
14 calendar. We have it scheduled for the 18th?

15 MR. STOLAR: We do, Judge.

16 THE COURT: All right.

17 MR. STOLAR: My cocounsel Khurram Wahid has asked me
18 to ask you to see if we can put the hearing off so he can be
19 present. He's presently on trial in the Eastern District of
20 Virginia. He expects the case to wind up approximately
21 Thanksgiving weekend. It is a fairly high profile, serious
22 case that he has been on trial with for about two weeks.

23 THE COURT: I am not available. I have a problem
24 with availability on -- I won't be available the week after
25 Thanksgiving.

1 MR. STOLAR: Mr. Harrison runs into a problem. My
2 suggestion is that we go over to January with the hearing.

3 THE COURT: Aren't we supposed to be on trial in
4 January?

5 MR. HARRISON: Yes, Judge.

6 MR. STOLAR: Yes. It is down in my book with a
7 question mark.

8 MR. HARRISON: Judge, we are definitely set for
9 January 9th. The only question, I know we are moving court
10 then. You said there might be half day or day delay.

11 THE COURT: I can't predict. I can't predict that
12 if we move the trial we are going to end up moving it to the
13 day that we actually are moving. I can't --

14 MR. HARRISON: That's my impression. We are
15 definitely set for January 9th.

16 THE COURT: You want to put the hearing on for
17 January 9th?

18 MR. HARRISON: I don't. I would like to go next
19 week when we are scheduled to go. I like Mr. Wahid but I
20 don't know why we necessarily need him for the suppression
21 hearing.

22 MR. STOLAR: Because he has done a good portion of
23 the work. He's also done some of the non-defendant witnesses.

24 THE COURT: What you are saying is, we can't do it
25 on November 18th. We have to move it to January?

1 MR. STOLAR: We can do it in December, depending
2 on --

3 MR. HARRISON: I am starting trial November 28th in
4 front of Judge Trager. It is going to go pretty much up until
5 Christmas.

6 THE COURT: I am scheduled to have a trial also
7 then, that entire month. I could take off -- maybe take one
8 day off.

9 If you are not available either, we will forget
10 about December. Okay.

11 MR. STOLAR: So early --

12 THE COURT: The options are either just going
13 forward with it on the 18th and then having the trial
14 January 9th, or if we do the hearing, then you are going to
15 want to brief it, we would have to put the trial off.

16 MR. STOLAR: How about the week of January 2nd?

17 MR. HARRISON: The cautionary note that I would
18 mention, Judge, is that if things got pushed back, then I have
19 a concern because I am going to be out of the office probably
20 for the first week of February and then for March and most of
21 April. I am just concerned if we keep pushing things back
22 towards January, things are going to get pushed back.

23 Mr. Stolar also is going to, I think, submit to Your
24 Honor -- he would like to have a rather lengthy questionnaire.
25 The government's position is it is not necessary to have a

1 lengthy questionnaire in this case. I wouldn't mind
2 submitting some extra voir dire questions to Your Honor,
3 something along the lines of what I believe Your Honor did in
4 Maflahi. So that's not something where we are giving a jury,
5 the voir dire panel, a lengthy questionnaire that will take
6 them weeks to fill out and us another two weeks to score and
7 then come back and have another week of questions. I think we
8 can accomplish this in a couple of days, just with some extra
9 voir dire questions that are asked by the Court.

10 MR. STOLAR: I thought --

11 THE COURT: I'm sorry.

12 MR. STOLAR: I thought we were on the scheduling
13 question.

14 MR. HARRISON: That's my point.

15 THE COURT: The point is that if the questionnaire
16 takes a long time, then we do have an issue.

17 MR. STOLAR: Judge, you have not even determined
18 whether or not you are willing to consider using a
19 questionnaire. That's why I wrote you the letter.

20 THE COURT: I thought that -- your letter said the
21 government had no opposition to the request.

22 MR. STOLAR: That --

23 MR. HARRISON: He raised it as a general
24 hypothetical at the last status conference. I said I don't
25 have an immediate opposition to it. I wanted to think about

1 it.

2 I also would have some questions that I would like
3 to submit for voir dire but I don't think a full blown lengthy
4 questionnaire is necessary.

5 THE COURT: Maybe the thing to do with respect to
6 the questionnaire is have you, as soon as possible, submit to
7 me the questions that you think should go in a questionnaire.
8 Try to work out between yourselves as much as you can an
9 agreement as to the questions. After I look at it I can
10 decide whether I think this is something that could be done in
11 a --

12 MR. STOLAR: I have a draft of a full blown
13 questionnaire which I haven't gone over with Mr. Harrison yet.
14 It is much too long. I will --

15 THE COURT: Let's fix some time for this to be done.
16 Give me -- then we will go back to the other scheduling. Can
17 you give me a date by which you can get your proposed
18 questionnaire to Mr. Harrison and he can respond? Then when I
19 take a look at it when it is all done I can decide whether I
20 think we need a questionnaire.

21 MR. STOLAR: Taking his suggestion, obviously there
22 are -- the major thrust of the letter that I wrote you has to
23 do with people being more honest in the privacy of filling out
24 a questionnaire on some of the more combustible issues in the
25 case.

1 THE COURT: Right. That's not the word you want to
2 use, right?

3 MR. HARRISON: No, Judge, I wouldn't think so.

4 THE COURT: You may recall better than I do in terms
5 of the Maflahi case what -- did I take all the jurors in the
6 back?

7 MR. HARRISON: I think you did, Judge. That's my
8 understanding from Ms. Moore.

9 THE COURT: I had another case. I actually had a
10 case but it wasn't a charge of terrorism. It was just that
11 the defendants were Arabic defendants and they were -- it was
12 a white collar case. There was no charge of terrorism but it
13 was immediately after 9/11.

14 MR. HARRISON: I believe the defendants were going
15 to learn about the fact that the original investigation was a
16 terrorism investigation.

17 THE COURT: No. The case that I am -- I am not
18 talking about Maflahi. I am talking about a different case
19 that I did where what I did was simply -- I actually
20 interviewed every single juror in the back. It was actually
21 fairly efficient and effective.

22 MR. HARRISON: That was going to be part of my
23 suggestion. That would take care of the defense's privacy
24 concerns.

25 THE COURT: It may be in this case we may be able to

1 cut back on the number of people who I have to interview.

2 MR. STOLAR: Based on the written response?

3 THE COURT: Based on the questionnaire. I am
4 certainly prepared to consider it. I don't see any reason to
5 have a very lengthy questionnaire.

6 MR. STOLAR: No. I am willing to cut it down to the
7 issues that I highlight in my letter to you.

8 THE COURT: Okay. I would suggest -- let's have a
9 date by which you will file the proposed questions. Either
10 this will be in a questionnaire or this will be your proposed
11 voir dire, presumably.

12 MR. STOLAR: Again, it is the privacy. It's like
13 asking somebody in front of all the jurors.

14 THE COURT: I will not do that. I can assure you, I
15 am not going to do that.

16 MR. STOLAR: You start on the 28th? Mr. Harrison?

17 MR. HARRISON: Yes.

18 You can get it -- the forms, I will look at it
19 whenever.

20 THE COURT: Let's do that right now. Then I can
21 start thinking about that.

22 MR. STOLAR: All right. Let me take two weeks to
23 try to put it together for you.

24 THE COURT: Okay. That would be what?

25 MR. STOLAR: That would be the -- around the 23rd.

1 I will try to get it out --

2 THE COURT: Before Thanksgiving?

3 MR. STOLAR: Thanksgiving present.

4 THE COURT: All right. 11/23 for the defendant's
5 proposed questionnaire.

6 Mr. Harrison?

7 MR. HARRISON: If you give me, I guess, until the
8 end of the next week, which is December 2nd.

9 THE COURT: Okay. Then really what I am interested
10 in is something after you exchange these and what remains in
11 dispute.

12 MR. HARRISON: Sure.

13 THE COURT: If you can put something like that
14 together.

15 MR. STOLAR: Okay.

16 THE COURT: Okay. Say a week after that,
17 December 9th, what's agreed and what isn't agreed, a
18 statement.

19 MR. HARRISON: That's something in writing to you,
20 Judge.

21 THE COURT: Yes, I think something in writing.

22 MR. STOLAR: You want me to submit to the government
23 and then they will get back to me in a week?

24 THE COURT: Exactly. Try to work it out together
25 and get me something. That's fine.

1 Then the question is, since I have actually never
2 used a questionnaire, how to prepare it for a case. We never
3 had to do it.

4 I don't really know how long it does take in terms
5 of jury selection.

6 MR. STOLAR: It doesn't really delay it that much,
7 even with the full blown questionnaires.

8 THE COURT: We have to bring the jurors here. They
9 look at the questionnaire and fill it out somewhere, probably
10 in the courtroom on the second floor.

11 How many jurors do you think we will need to call?

12 MR. STOLAR: How long do you think the trial is
13 going to take? The government's case?

14 MR. HARRISON: I would say, the government's case
15 won't take more than two weeks, at the most, I would think.

16 THE COURT: We are not sitting on Fridays.

17 MR. STOLAR: That would be the preference.

18 THE COURT: Okay.

19 MR. HARRISON: I have to say, I've never actually
20 done a questionnaire either. In talking to a number of people
21 from my office who have, they describe sort of a nightmare
22 scenario. After the jurors fill it out, it usually takes,
23 because of the number of questions, the number of jurors to
24 fill out the forms, it takes a couple of weeks for the various
25 attorneys to score the sheets and figure out.

1 THE COURT: There are only two of you.

2 MR. HARRISON: Right. Two sides, each of the two
3 sides to go over things. It takes a significant amount of
4 time and manpower.

5 MR. STOLAR: Here we are cutting it down to
6 basically questions about the issues that I have outlined. I
7 think we are going to run into -- I think we should have a
8 larger pool rather than a smaller one.

9 THE COURT: Obviously.

10 Are we talking about how many hundreds of people are
11 we going to need? I think the government probably would have
12 a better idea based on other cases that have been done in the
13 office.

14 MR. HARRISON: Again, I've never actually done a
15 case with a questionnaire. I can find out.

16 THE COURT: I don't know that that makes a
17 difference.

18 MR. HARRISON: My guess is, and I will ask, my guess
19 is in cases with questionnaires, more people get struck.
20 There is just more information for the attorneys to argue that
21 someone should be struck. That's sort of another reason why
22 everything sort of takes longer with a questionnaire. I could
23 try and find out and maybe submit something to the Court.

24 THE COURT: Right.

25 We obviously don't have to get the jurors now. We

1 need plenty of notice. We can't ask them the week before. If
2 we need more jurors than would fit into the ceremonial
3 courtroom, we may have to do it on multiple days. Again,
4 there is -- my sense of it was, there was a lot of logistics
5 to it which we maybe we could avoid with something else.

6 MR. HARRISON: That's my understanding.

7 MR. STOLAR: How many people does the ceremonial
8 courtroom sit?

9 THE COURT: Two hundred.

10 THE CLERK: A little more, 250.

11 THE COURT: Between two and 300.

12 Counsel, just a thought which is that if the idea
13 is to really quickly get rid of jurors who can't be fair,
14 maybe a relatively brief questionnaire dealing with those type
15 of issues that are a problem here and we could eliminate lots
16 of jurors and then do a private voir dire with everyone else.

17 MR. STOLAR: That makes sense.

18 THE COURT: That might be the way to do it, rather
19 than creating this unwieldy -- I haven't had much sympathy for
20 the questionnaire practice based upon my understanding of how
21 unwieldy it was. I can understand the concerns here. There
22 may be some kind of combination that would work well. I
23 certainly am not looking to interview 300 people if I don't
24 have to.

25 MR. STOLAR: No. I think that the -- if the

1 questions are properly phrased, that people who feel sensitive
2 about it are going to be quickly eliminated. They will
3 self-eliminate, essentially. Then we will be back to
4 essentially the normal voir dire and perhaps a follow-up on
5 some of the iffy responses that people will give.

6 THE COURT: Okay.

7 MR. STOLAR: Good.

8 THE COURT: All right.

9 MR. STOLAR: That brings us back to scheduling.

10 THE COURT: Okay.

11 MR. STOLAR: The hearing on the motion to suppress,
12 I do think that Mr. Wahid, his presence I think is necessary,
13 which is why I would like to sort of -- I would even do it, if
14 you are working between Christmas and New Years, we can come
15 in then.

16 MR. HARRISON: My guess is I am going to have
17 problems with witnesses.

18 MR. STOLAR: The agents don't want to come in?

19 MR. HARRISON: During that period, yes, Judge.

20 THE COURT: If we -- let's see. If we did the
21 suppression hearing on the 9th, but then you are going to need
22 time to brief it. Then we would definitely have to put the
23 trial over for a significant period of time.

24 You will be back when?

25 MR. HARRISON: I would be back mid-April, Judge.

1 MR. STOLAR: That's fine. I don't have a problem
2 with that.

3 THE COURT: It will certainly give us plenty of time
4 to work on the questionnaire.

5 MR. STOLAR: Among other things.

6 THE COURT: Mr. Harrison?

7 MR. STOLAR: One of the other considerations also, I
8 have to say in terms of time, is that I have -- my client was
9 able to bring in the -- his corrections of the transcripts of
10 seven of the 14 disks, which I am getting --

11 THE COURT: Whose corrections? Your client's?

12 MR. STOLAR: My client's corrections.

13 I am going to make copies of those and get them to
14 Mr. Harrison so that he can see -- we are trying to get to
15 some kind of an agreed rendition transcript of what's on the
16 tapes.

17 THE COURT: He's corrected seven so far?

18 MR. STOLAR: Seven so far, since he has been moved
19 down from the SHU. Of course, the disks didn't get moved down
20 with him. So we are now scrambling to try to get the disks
21 down from SHU going through the counselor and MDC Legal.

22 THE COURT: Okay.

23 MR. STOLAR: He has one conversation left on the
24 eighth transcript.

25 THE COURT: All right. Mr. Harrison, can you

1 accommodate that? We will do the suppression motion on the
2 9th and then we will put the trial over? That will be
3 briefed.

4 MR. HARRISON: Okay, judge.

5 THE COURT: Is that all right with you?

6 MR. HARRISON: Yes.

7 THE COURT: Your schedule?

8 Okay. Then we don't need the November 18th at all.

9 MR. STOLAR: Right.

10 THE COURT: Okay. Let's pick a date and let's make
11 this firm now.

12 MR. STOLAR: Okay.

13 THE COURT: Mr. Harrison?

14 MR. STOLAR: Not so strangely, my entire month of
15 April is clear.

16 THE COURT: Me too.

17 MR. HARRISON: I will be back mid-April, Judge. If
18 we can -- the first week of May?

19 MR. STOLAR: May 1st?

20 THE COURT: Just a second.

21 MR. STOLAR: May Day, Law Day.

22 THE COURT: You said the government two weeks and
23 the defense maybe a week, right?

24 MR. STOLAR: I don't think it will be that long.
25 There will be a defense case.

1 THE COURT: Could we start -- I just have
2 something -- I don't want to backup into something that's a
3 problem. So how about starting on April 24th?

4 MR. STOLAR: That works.

5 MR. HARRISON: My problem is, I am coming back right
6 then. I am going to need a little bit of time to get
7 everything together. I was going to ask for, I guess, for
8 May 1st, if that's possible. It is a Monday.

9 MR. STOLAR: It's Labor Day in Mexico, Judge.

10 THE COURT: The problem is that -- you are saying
11 it's three weeks but then we have the issue of the
12 questionnaire. We don't how long that's going to take.

13 MR. STOLAR: It's not going to take that long.

14 THE COURT: It could take a week.

15 MR. STOLAR: I don't think so. Given what I am
16 thinking about cutting down the questionnaire to, it will
17 probably be like --

18 THE COURT: It has to take at least three, four days
19 to do jury selection in this case. There is no way that it
20 won't.

21 MR. STOLAR: Right.

22 THE COURT: I am just concerned about putting this
23 over.

24 MR. STOLAR: Do you have something in June?

25 THE COURT: I do.

1 MR. HARRISON: We could, Judge, if April 24th is a
2 jury return day, I guess we could have jurors come in and fill
3 out a questionnaire and then at least the lawyers could get
4 that going that week.

5 THE COURT: Exactly. If you could do that, then I
6 could feel somewhat confident that we'd actually start the
7 trial on the May 1st.

8 MR. STOLAR: Right. That would be the idea. We get
9 jury selection taken care of.

10 THE COURT: Okay. Good.

11 All right, counsel. When should I put this on for
12 the next conference?

13 Are there any other issues, discovery issues?

14 MR. STOLAR: The only other issue that I have on my
15 laundry list here is that -- is the question of early
16 disclosure of Brady and Giglio material. Mr. Harrison in his
17 letter dated yesterday did release a piece of Brady
18 information. But the -- one of the major things that I was
19 looking for, which Mr. Harrison does not respond to, had to do
20 with any reports that are made by the confidential informant
21 to his handler of conversations that he had with Martin where
22 Martin is resistant to the idea of engaging in any kind of
23 violent activity.

24 THE COURT: Mr. Harrison, you said that you would
25 respond to that, you would consider that.

1 MR. HARRISON: We argued this at -- I thought Your
2 Honor dealt with this.

3
4 THE COURT: I did. My recollection is that what you
5 indicated at that point was that you hadn't at that point
6 fully understood what Mr. Stolar's concern was and that you
7 would review the material and provide --

8 MR. HARRISON: That was related to the Brady letter
9 that I just turned over.

10 Mr. Stolar's point was, he made clear at the last
11 time we were here that they were going to impose an entrapment
12 defense. Based on that, I wanted to go back and look at our
13 materials and see if there was anything that was more likely
14 to be Brady based on that. That's what I did. That's the
15 letter I wrote.

16 As I put in my letter, I don't think that's actually
17 technically Brady but I wanted to be on the safe side and turn
18 it over. That's what that was as to. We argued orally about
19 the other reports. I think it was pretty clear at least from
20 the my point of view --

21 THE COURT: I ruled.

22 MR. STOLAR: You ruled they weren't Rule 16.

23 THE COURT: Correct.

24 MR. STOLAR: But this is a different -- the same
25 report but a different issue.

1 THE COURT: If they are Brady, they have an
2 obligation to turn it over. I am not sure what --

3 MR. HARRISON: What --

4 MR. STOLAR: In the -- any of the reports that the
5 CI, Dadouhdi. D A D O U H D I -- that's not the right
6 spelling, Judge.

7 THE DEFENDANT: D A W O D I.

8 MR. STOLAR: D A W O D I, Dawodi.

9 THE COURT: Okay.

10 MR. STOLAR: In the -- in months prior to his
11 beginning to tape conversations with Mr. Matin, I am sure he
12 made reports to his handler about interactions that he had
13 with Matin and others. If in those reports there are
14 indications that Matin was resistant to the idea or expressed
15 ideas that say I don't want to be involved in any kind of
16 violent jihad or any kind of conduct of that nature, those
17 would be Brady, given the nature of an entrapment defense.
18 That shows predisposition, as opposed to something that comes
19 later on, which is a willing participation in the conspiracy.

20 THE COURT: Okay.

21 MR. HARRISON: Okay. Right. So we have gone past
22 the issue of -- before Mr. Stolar wanted all the reports
23 regardless of --

24 MR. STOLAR: Rule 16.

25 MR. HARRISON: I understand. I will check again. I

1 think I have gone through the stuff with an eye towards that.

2 There was a mention in the original complaint filed
3 in open court that the defendant had made a statement like
4 that related directly to the bombing conspiracy, that he
5 didn't want to kill anybody. We put that in the complaint.
6 It's not like that hasn't been disclosed.

7 MR. STOLAR: That's in the tapes.

8 MR. HARRISON: As far as I remember, there is
9 nothing else in there. I will go back and check once again.

10 THE COURT: Anything else?

11 MR. STOLAR: That completes my laundry list.

12 THE COURT: All right. Let's -- when shall we meet
13 again then?

14 MR. HARRISON: Do you want to meet on December 16th,
15 Judge, just as a status, a week after we submit any disputes
16 that we have about the questionnaires in writing to you?

17 MR. STOLAR: If we can do it in the afternoon,
18 that's fine with me.

19 THE COURT: That's fine. Okay. How about 4:00
20 o'clock?

21 MR. STOLAR: 4:00 o'clock on Friday is always
22 wonderful.

23 THE COURT: Okay.

24 MR. HARRISON: Judge, I assume the defense is
25 agreeing to exclude the time, speedy trial time, up until our

1 trial date.

2 MR. STOLAR: Of course.

3 THE COURT: Since they requested it, I think that's
4 appropriate.

5 MR. HARRISON: Thank you, Judge.

6 THE COURT: Time will be excluded until our trial
7 date, April 24th.

8 Okay. Thank you very much.

9 MR. HARRISON: Thank you.

10 MR. STOLAR: Thank you.

11 (Matter concludes.)
12
13
14
15
16
17
18
19
20
21
22
23
24
25